Nos. 85-1190 and 85-1207

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ASSOCIATED GAS DISTRIBUTORS AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

TRANSCONTINENTAL GAS PIPE LINE CORP., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS ASSOCIATED GAS DISTRIBUTORS AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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TABLE OF AUTHORITIES

Cases:	Page
Public Service Commission v. Mid-Louisiana Gas Co., 463 U.S. 319	2, 3
Statutes:	
Natural Gas Act, 15 U.S.C. 717 *et seq.*	2
Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*	2
15 U.S.C. 3301(20)	3
15 U.S.C. 3314(b)(2)	3
15 U.S.C. 3316(c)	3
15 U.S.C. 3317(b)	3
15 U.S.C. 3319(b)(2)	3
15 U.S.C. 3320	3
15 U.S.C. 3411(b)	3
15 U.S.C. 3414(a)	2, 3

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Pursuant to Rule 22.5 of this Court, Petitioners, Associated Gas Distributors and the Public Service Commission of the State of New York, hereby reply to the briefs in opposition to their petition filed by Respondent Federal Energy Regulatory Commission (Commission) and the "undersigned producers" (Producers). The briefs in opposition fail to justify the decision of the court below, which erroneously affirmed the Commission's holding that natural gas producers may receive both the maximum lawful price allowed under the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*, (NGPA), in cash *and* additional value in the form of free or underpriced transportation of producer-owned liquids and liquefiables, without violating Section 504(a) of the NGPA, which prohibits the sale of "natural gas at a first sale price in excess of any applicable maximum lawful price". 15 U.S.C. § 3414(a).

The Commission argues that the decision of the court below can be affirmed because the Commission's decision: (1) was consistent with its treatment of liquids and liquefiables transportation for purposes of producer and pipeline rate regulation prior to the NGPA, (2) was a proper exercise of its authority to define terms used in the NGPA, and (3) avoids the administrative burden and regulatory delay involved in determining the value of non-monetary consideration received by producers. For the reasons stated below, the Commission's arugments should be rejected.

1. The Commission's treatment of liquids and liquefiables transportation for purposes of producer or pipeline rate regulation under the Natural Gas Act of 1938, 15 U.S.C. §§ 717 et seq. (NGA), has no bearing whatsoever on whether the ceiling price provisions of the NGPA have been violated. As the Court stated in *Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983), the NGPA: (1) "comprehensively and dramatically changed the method of pricing natural gas produced in the United States", (2) "explicitly estab-

lishes an incentive pricing scheme that is wholly divorced from the traditional historical-cost methods applied by the Commission in implementing the NGA", *Id.* at 333, and (3) "replaces the Commission's authority to fix rates of return to gas producers according to what is 'just and reasonable' with a precise schedule of price ceilings", *Id.* at 334. The Commission's authority to adjust the NGPA price ceilings is strictly limited.[1] None of the exceptions to the ceiling price limitations expressly permitted by Congress in Title I of the NGPA applies to the additional value at issue here. Receipt of these valuable services in addition to the maximum lawful price in cash, therefore, constitutes a violation of the first sale price limitations in Section 504(a)(1) of the NGPA. Petition in No. 85-1190 at 7-8. The Commission's rate regulation practice under the NGA is irrelevant to the issue before the Court here.

2. The Commission's authority under NGPA Section 501(b) to define terms used in the NGPA must be exercised in a manner "consistent with the definitions set forth" in the Act. 15 U.S.C. § 3411(b). In this case, the Commission has abused its authority under Section 501(b) by ignoring the definition of the term "sale" in NGPA Section 2(20), 15 U.S.C. § 3301(20), ("any sale, exchange, or other transfer for value") in interpreting the critical term "first sale price" in Section 504(a)(1), 15 U.S.C. Section 3414(a)(1). See Petition in No. 85-1190 at 5.

3. The Commission's argument that determining the value of liquids and liquefiables transportation services would entail lengthy administrative proceedings with a resulting delay and uncertainty with respect to natural gas prices should be rejected. The Commission must do

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[1] See NGPA Sections 104(b)(2), 106(c), 107(b), 109(b)(2), and 110, 15 U.S.C. §§ 3314(b)(2), 3316(c), 3317(b), 3319(b)(2) and 3320.

whatever is necessary to prevent violations of the NGPA. In this case, the Commission has refused to even initiate a proceeding to determine the value of liquids and liquefiables transportation in relation to NGPA ceiling price limitations. Its protests about administrative burden and delay are merely speculative and self-serving.

4. The Producers' brief in opposition attempts to defend the orders of the Commission and the Court below by distinguishing the price paid for natural gas produced at the wellhead from the consideration for services performed after the gas leaves the wellhead. Producers' Brief at 5-9. Neither the Commission nor the court below rested its decision on any such distinction. The Producers' argument simply misses the mark.

5. In sum, neither the Commission's nor the Producers' brief in opposition to the petition for certiorari comes to grips with the fundamental error before the Court in this case: a violation of the ceiling price provisions of Title I of the NGPA cannot be excused on the basis of the Commission's rate regulation practices under the NGA or on the basis that pipeline customers may be protected from paying the pipelines' costs of providing liquids and liquefiables services to the producers in rate proceedings under the NGA. The NGPA makes it unlawful for producers to receive a first sale price in excess of the Title I ceiling prices. The Commission's Declaratory Order and the order of the court below affirming it are in conflict with the clear language of the NGPA, invite circumvention of the NGPA ceiling price limitations, and would permit substantial windfall profits not intended by Congress.

CONCLUSION

For the foregoing reasons, Petitioners request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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